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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 163–173) is reported at 156 F. 2d 769.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 29, 1946 (R. 173). A petition for rehearing, filed on August 17, 1946, was denied on August 29, 1946 (R. 193). The petition for a writ of certiorari was filed on November 25, 1946. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether trust patents, issued by the United States to certain Indian wards and describing by metes and bounds tracts of land riparian to a non-navigable stream, included the bed of the stream when a statute of the Oklahoma Territory, applicable when the patents were made, adopted the common-law rule that a conveyance of riparian lands bordering upon a non-navigable stream carried title to the bed of the stream.

2. If so, whether such title, held as trustee for the Indian allottees, was subsequently divested out of the United States and appropriated by the State of Oklahoma, by virtue of a determination by the State Supreme Court, years after the patents issued and after the admission of Oklahoma to the Union in a case to which neither the United States nor its allottees were parties, that the stream was navigable; or whether such title was appropriated by the State by means of a State statute, passed in 1919, asserting title to the beds of streams over two chains in width.

STATUTES INVOLVED

Sec. 4173, St. 1890, enacted by the legislature for Oklahoma Territory, reads:

> * * * In all cases where the opposite banks of any streams not navigable belong

> to different persons, the stream and the bed thereof shall become common to both.

The Act of March 28, 1919, 64 Okla. Stat. Ann. sec. 290, provides:

> The Commissioners of the Land Office are hereby authorized to lease for oil and gas purposes all lands between mean high water mark in all streams or rivers of two chains or over; all such streams are declared the property of the State of Oklahoma. (Laws 1919, ch. 206, p. 293, § 1.)

STATEMENT

Prior to the admission of Oklahoma to the Union, the United States issued trust patents to certain of its Indian wards under which it held title for the Indian allottees to four riparian tracts on the south shore of the Arkansas River in Oklahoma. The judgment sought to be reviewed adjudicates that the United States also has title, in trust for the allottees under such trust patents, to those portions of the river bed which abut the riparian tracts, extending to the thread of the river. The riparian tracts are in color on the map at R. 35.

The land on both sides of the Arkansas River at the location in question was first surveyed into sections, townships, and ranges in September, 1872 (Fdg. VI, R. 69, Def't's Exs. 7 and 8, Orig.). In 1893, 1906, and 1907, the United States issued four trust patents to certain Pawnee and

Otoe Indians.[1] These patents neither included nor excluded the adjoining river bed and simply described the parcels by survey descriptions. (R. 67–68, 69, 114–120.)

On July 20, 1942, the State of Oklahoma executed two oil and gas leases in favor of petitioner Champlin Refining Company, covering the south half of the Arkansas River bed for a considerable distance including the area adjoining the four Indian allotments already described, and the Champlin Refining Company has drilled one well which is producing in commercial quantities (Fdg. X, R. 70; Pltf's Exs. A and B, R. 14–20).

On July 13, 1943, the United States began the instant proceeding by filing its complaint against the Champlin Refining Company, a New Mexico corporation (R. 1–13). In that petition the Government pleaded the various grants, reservations, conveyances, and allotments. It was further alleged that under the lands held in trust by the United States for its allottees or their heirs, there were valuable mineral deposits consisting of oil and gas, and that the State of Oklahoma had

[1] Under a treaty with the Cherokee Nation in 1866, it was agreed that friendly Indians might be settled on these lands (R. 65–66). The Otoe and Missouria Indians were assigned a portion of the lands and in 1883 the Cherokee Nation conveyed such portion to the United States in trust for the Otoes and Missourias (R. 66, 129–133). Similarly, a portion of the lands was set aside for the Pawnee Indians, and the Cherokees conveyed title thereto to the United States (R. 67, 122–127).

no proprietary title or interest in the bed of the Arkansas River and was without power to confer, by lease or otherwise, any title or interest in those portions of the river bed adjoining the allotments. The complaint prayed that the Champlin Company be enjoined from trespassing upon the river bed and drilling for minerals thereunder, that the leases be cancelled, that the Champlin Company be enjoined from asserting any title to the river bed and that title be quieted in the United States, its allottees and the heirs of deceased allottees.

On August 5, 1943, the Champlin Refining Company filed an answer (R. 22–23) and the State of Oklahoma subsequently filed an answer (R. 26–28), the State having been granted leave to intervene by order of August 20, 1943 (R. 23–25). The answers of these two parties, as amended (R. 28–29, R. 29–30), admitted execution of the oil and gas leases but alleged, in effect, that the State of Oklahoma was the owner of the river bed included in the leases because the river bed became the property of the State upon its admission to the Union.

On December 21, 1944, the trial court filed its findings of fact and conclusions of law (R. 65–75). In addition to the findings already noted, the court found that in all of the reservations, grants, and conveyances, the bed of the river was neither expressly included nor excluded (Fdg. V),

and that "the Arkansas River, at the points in question in this litigation and at all times herein material, is not navigable in fact" (Fdg. VII). The court concluded that the State had power to declare rivers navigable and that the decision of the Supreme Court of Oklahoma in 1914, *State* v. *Nolegs,* 40 Okla. 479, 139 Pac. 943, wherein it was held that the river was navigable, controlled the court's decision in the instant case; that the State was owner of the bed at the points in issue; and that the United States had no title to the bed of the river. A judgment to this effect was entered (R. 75–76), from which the Government appealed (R. 76).

Upon appeal, the circuit court of appeals, relying upon decisions of this Court, held (R. 168–173) that the question of navigability was a federal question, that under the federal rule non-navigability in fact is non-navigability in law, and that the State of Oklahoma could not adopt a retroactive rule which would destroy a title already accrued under federal law and grant, or would enlarge what passed to Oklahoma at the time of her admission to the Union. The court further held that at the time the trust patents were issued, the common-law rule prevailed in Oklahoma Territory and that the grants of riparian tracts carried with them title to the river bed. Accordingly, the circuit court of appeals reversed the judgment of the trial court (R. 173).

ARGUMENT

1. "The Arkansas River, at the points here in issue and at all times herein material, is not navigable in fact." (R. 69). Petitioners concede this (Pet. 2).[2] The trust patents neither expressly included nor excluded the bed of the river (R. 69). The rule for construction of such grants was declared by this Court in *Oklahoma* v. *Texas,* 258 U. S. 574, 594–595, to be that "if its intention be not otherwise shown, it [the United States] will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies." Local law does not apply as such, but rather as an "obvious guide" to the intention of the United States. *United States* v. *Oregon,* 295 U. S. 1, 28. Since the patents here in question were issued prior to Oklahoma's admission to the Union, clearly the local law furnishing the "obvious guide" is the law in force in the Oklahoma Territory. Cf. *United States* v. *Elliott,* 131 F. 2d 720, 723 (C. C. A. 10). Section 4173, St. 1890, of the Territorial Statutes (*supra,* pp. 2–3) put in force the common-law rule under which title to the bed of the stream to the center thereof passes

[2] It had already been determined to be non-navigable above its confluence with the Grand River (which includes the portion of the river here in question) in litigation between the United States and the State of Oklahoma. *United States* v. *Brewer-Elliott Oil & Gas Co.*, 249 Fed. 609 (W. D. Okla.), affirmed, 270 Fed. 100 (C. C. A. 8), 260 U. S. 77.

with a grant of the shore land. Cf. *Railroad Co.* v. *Schurmeir,* 7 Wall. 272, 289.[3] Accordingly, the court below, relying upon the rule enunciated by this Court in *Oklahoma* v. *Texas, supra,* held that, under the local law in force at the time the trust patents were issued, title to the bed of the river passed with the grant of the shore land.

The decision of this Court in *Oklahoma* v. *Texas, supra,* is on all fours. There the Government litigated with the State of Oklahoma title to the bed of the Red River. While the United States claimed the south half of the bed for itself, its claim to portions of the north half of the river bed was interposed, as is the case here, in behalf of Indian allottees to whom it had granted trust patents covering riparian allotments on the north bank. There, as here, the lands were surveyed and the river meandered, but the township and section lines were not extended across the river (258 U. S. 585), and the disposals were made according to the legal subdivision established by the official survey of the upland (258 U. S. 595). The only difference between that case and this one is that there the trust patents were issued in 1909 and 1910 (258

[3] The law adopted by the State of Oklahoma upon its admission to the Union is irrelevant. However, the common-law rule was likewise adopted by the State. *Oklahoma* v. *Texas*, 258 U. S. 574, 596; *Hale* v. *Record*, 44 Okla. 803, 146 Pac. 587; *Anderson-Pritchard Oil Corp.* v. *Key Okla Oil Co.*, 149 Okla. 262, 299 Pac. 850; *Hunzicker* v. *Kleeden*, 161 Okla. 102, 17 P. 2d 384.

U. S. 596), which was after Oklahoma became a state, while here the patents issued prior to Oklahoma's admission to the Union. This Court there held that, since it found the river to be nonnavigable in fact, and since the common-law rule prevailed in Oklahoma when the trust patents issued, title to the north half of the river bed passed with the grant of the shore tracts.[4] So here, the river being found by the courts below, and conceded by petitioners, to be nonnavigable in fact, title to the portions of the south half of the river bed passed with the grant of the shore land under the trust patents.

Petitioners' attempted distinction of *Oklahoma* v. *Texas* (Pet. 40) is invalid. The fact that in previously setting up a tribal reservation, the Government had bounded it by the main channel of the river was merely one of the historical circumstances which led this Court to conclude that the United States intended to grant the north half of the river bed as an incident to grants of land on the north bank of the river.[5] But the Court also based its decision on the alternative and entirely independent ground that the

[4] Thus, even if the law of Oklahoma were relevant, title to the river bed vested under the trust patents by Oklahoma law prior to the *Nolegs* decision upon which petitioners rely (Pet. 2, 41).

[5] The United States contended in the instant case that the historical circumstances showed a similar intent on the part of the Government. The circuit court of appeals did not find it necessary to pass on this contention.

trust patents alone had the same effect under the common-law rule in force in Oklahoma at the time of the grants.

2. In their Proposition 1 (Pet. 16–30), petitioners argue, without cited authority, that title to the river bed remained in the Cherokee Nation until 1891 when, they say, it became part of the public domain of the United States. While this argument is unsound, and title to the river bed could be shown to have passed under the deeds to the United States in trust for the tribes, it need not be pursued here. Petitioners do not show what difference it would make in construing the trust patents in question. The rule is the same whether the Government is disposing of public lands or tribal lands. *Oklahoma* v. *Texas,* 258 U. S. 574, 594, 595. Moreover, in grants of riparian public lands on non-navigable streams, it has long been the general policy of the United States not to withhold the beds of the streams. *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 87; R. S. 2476, 43 U. S. C. 931.

Petitioners' second proposition (Pet. 30–34), that reference is made to local law in determining whether the bed passes is agreed to in principle. But under the local law here applicable (*supra,* pp. 7–8) title to the bed passes under the trust patents.

In petitioners' Proposition 3 (Pet. 34–41) they assert that the decision of the Supreme Court

of Oklahoma in 1914, in the case of *State* v. *Nolegs,* 40 Okla. 479, 139 Pac. 943, in which it was held that the Arkansas River was navigable in Oklahoma, fixes the character of the river in law and that by reason of such judicial determination title passed to the State. Oklahoma does not claim under any express grant and accordingly relies upon the principle of equality of States (Pet. 6, Ans. Par. 13, R. 26–27). That principle, however, means only that, upon admission to the Union, a State acquires the beds of navigable rivers. *Oklahoma* v. *Texas,* 258 U. S. 574, 583; *United States* v. *Utah,* 283 U. S. 64, 75. Since the claim of the State under this principle is an assertion of a federal right, and since the effect upon title to such lands is the result of federal action in admitting a State to the Union, the question of navigability is a federal, not a local question. *United States* v. *Holt Bank,* 270 U. S. 49, 54, 55; *United States* v. *Oregon,* 295 U. S. 1, 14. It is the settled federal rule that "navigability in fact is the test of navigability in law." *Oklahoma* v. *Texas,* 258 U. S. 574, 586. See also *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 86.

The cases cited (Pet. 34–41) do not support the argument that the State can acquire title to the bed of a river concededly nonnavigable in fact simply by declaring the river navigable. This Court has held that State law cannot operate, at

least retroactively, to convert a federal grant of shore lands to third parties into a conveyance of the river bed to the State. *United States* v. *Oregon*, 295 U. S. 1, 28, and in the cases of *Oklahoma* v. *Texas*, *supra*, and *Brewer Oil Co.* v. *United States*, *supra*, and *Brewer Oil Co.* v. *United States*, *supra*, this Court specifically rejected petitioners' present contentions. In *Oklahoma* v. *Texas*, *supra*, Oklahoma relied upon a decision of the Oklahoma Supreme Court (*Hale* v. *Record*, 44 Okla. 803, 146 Pac. 587), holding that the Red River was navigable, as establishing the character of the river as such. This Court held that, since the United States was not a party to that litigation it was not bound by it, and, having found the river to be nonnavigable in fact, stated that "We conclude that no part of the river within Oklahoma is navigable and therefore that the title to the bed did not pass to the State on its admission into the Union. If the State has a lawful claim to any part of the bed, it is only such as may be incidental to its ownership of riparian lands on the northerly bank." (258 U. S. 591–592). Here, the river being nonnavigable in fact, and the State admittedly having no title to the shore lands, it likewise has no claim to the river bed.

Oklahoma for the second time advanced before this Court its present contention in *Brewer Oil Co.* v. *United States*, 260 U. S. 77. That case

involved title to the north half of the bed of the Arkansas River at the same point on the river here in question (R. 70). Oklahoma again asserted that navigability was a local question and that the navigable character of the Arkansas River had been settled by the Supreme Court of Oklahoma in the *Nolegs* case, the very decision now being relied upon by petitioners. Since the United States was not a party to the *Nolegs* litigation, this Court, in rejecting Oklahoma's contention, first cited its prior ruling on the point in *Oklahoma* v. *Texas, supra.* And since the federal grant to the Osage Nation there involved had been made prior to the admission of the State, as were the grants in the case at bar, Oklahoma's contention was rejected on the additional ground that the question was what title the Osages took in 1872 when the grant was made, thirty-five years before Oklahoma became a State, and that navigability was not a local question for the state tribunals to settle; that if before Oklahoma became a State the Osages had acquired title, there was nothing in the principle of equality of States permitting a divesting of the title; and that a State could not "adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here in-

voked" (260 U. S. at 87, 88). That holding applies with equal force here, since the trust patents were issued prior to Oklahoma's admission to the Union.

Under Proposition 4 (Pet. 41), petitioners assert that the *Nolegs* decision, as reinforced by an Oklahoma statute, has established a rule of property. The rule of property is to the contrary. The *Nolegs* decision has not been regarded as sound since this Court rejected it in 1922 in the *Brewer Oil Co.* case. The Supreme Court of Oklahoma acknowledged as much in 1932. *Vickery* v. *Yahola Sand & Gravel Co.,* 158 Okla. 120, 12 P. 2d 881, 882. And in *Law of Oil and Gas Leases,* Glassmire (1938 ed.) at p. 265, it is noted that much litigation over the beds of the Arkansas, Red, Cimarron and Canadian Rivers during the preceding fifteen years had been finally determined against the State and in favor of the riparian owners, "the Oklahoma courts having taken judicial notice that such streams, and tributaries thereof, were not navigable in fact." Glassmire also stated (p. 265), after citing the *Brewer-Elliott* litigation, that "Under this general rule of non-navigability in fact the bed of the Arkansas River in the Cherokee and Creek Nations also belongs to the present riparian owners."

The statute relied upon by petitioners (Pet. 41) as "reinforcing" the *Nolegs* decision, 64 O. S. A. 1937, sec. 290, is quoted *supra,* p. 3. It author-

izes the Commissioners of the Land Office to lease for oil and gas purposes all lands between mean and high water mark in all streams or rivers of two chains or over, and all such streams are declared the property of the State of Oklahoma. It was enacted in 1919, twenty-six years after the first trust patents here involved issued and twelve years after the later trust patents issued. The statute does not deal in terms of navigability. But if applied, as petitioners seek to apply it, to the Arkansas River, which petitioners concede to be non-navigable in fact, then it stands on no different footing than a similar statute of the State of Oregon to which the State sought to give retroactive effect in the case of *United States* v. *Oregon,* 295 U. S. 1. In rejecting Oregon's contention, this Court, after observing that the statute was adopted subsequent to the grants of the United States there involved, stated that "the case is not one of the reasonable construction of grants of the United States, but the attempted forfeiture to the State by legislative fiat of lands which, so far as they have not passed to the individual upland proprietors, remain the property of the United States" (295 U. S. 29).

There remains petitioners' Proposition 5 (Pet. 42–46), in which they attempt to show that the decision below, and necessarily the decision of this Court in *Oklahoma* v. *Texas,* 258 U. S. 574, is in conflict with the earlier decision of this Court in

Wear v. *Kansas*, 245 U. S. 154. It is sufficient to note, as did the circuit court of appeals (R. 172), that the *Wear* case did not present to this Court for review a judgment of the Supreme Court of Kansas which was based upon the view of the state court that, while acknowledging the river there in question to be non-navigable in fact, it nevertheless was holding it to be navigable in law. On the contrary, a reading of this Court's opinion shows that the state court had applied the federal rule of navigability in fact, and the only question passed upon by this Court which is remotely material here was the propriety of the state court's having found such fact by judicial notice. This Court simply held that, in the circumstances there present, consisting, among others, of prior decisions of the question by the state court, and a virtual concession of navigability in fact on the pleadings, it was not error so to determine the issue of navigability. Whatever the meaning of the gloss put upon the *Wear* decision in *Brewer Oil Co.* v. *United States*, 260 U. S. 77, 89, with respect to the power of a state to conclusively determine the navigability of a stream "without regard to the fact," it is clear, under the *Brewer* decision itself, that such action cannot conclude a "right to the bed of the river, granted and vesting before statehood," and that such is the right of the respondent here. *Ibid.* Thus neither the decision below nor the decision of this

Court in *Oklahoma* v. *Texas, supra,* is in conflict with this Court's earlier decision in the *Wear* case.

CONCLUSION

It is submitted that the questions presented were properly decided by the circuit court of appeals, that its decision is in accord with decisions of this Court upon which the lower court relied, that no conflict of decision is shown, and that accordingly the petition for a writ of certiorari should be denied.

Respectfully,

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